UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

vs. **18-cr-178 (MAD)**

BRIAN NORTHUP,

Defendant.

APPEARANCES: **OF COUNSEL:**

OFFICE OF THE UNITED STATES ATTORNEY
445 Broadway
Albany, New York 12201
Attorney for the Government

EMMET J. O'HANLON, AUSA

OFFICE OF THE FEDERAL PUBLIC DEFENDER - ALBANY OFFICE
39 North Pearl Street, 5th Floor
Albany, New York 12207
Attorney for Defendant

TIMOTHY E. AUSTIN, AFPD

Mae A. D'Agostino, U.S. District Judge:

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

The Court held an evidentiary hearing on April 15, 2019, regarding Defendant's motion to dismiss the indictment or to suppress evidence, namely, statements attributed to Brian Northup. The Government presented four witnesses: FBI Special Agent Paul Scuzzarella, FBI Supervisory Special Agent Michael Dwyer, FBI Task Force Officer Glen Vidansky, and FBI Special Agent Brian P. Seymour. Defendant presented the testimony of his mother, Karen Hamm. For the reasons contained herein, the motion to suppress is denied.

The parties have asserted and incorporated by reference arguments made pertaining to the constitutionality of the FBI's "Operation Pacifier" and its use of "Network Investigative Technique" in prior cases before this Court in support of dismissal.[1] For the same reasons as set forth in those cases, the motion to dismiss the indictment is denied.

II. BACKGROUND

On October 21, 2015, the FBI executed a warrant in the early morning on a home occupied by Defendant based upon probable cause relating to computer-based child pornography. *See* Dkt. No. 28 at 167. Members of a fourteen-person search team staged at a nearby location before the raid and then drove to the premises in a caravan of several vehicles. *Id*. at 28-31, 78-80, 173-74. The agents wore body armor, possessed handguns and ammunition, handcuffs, flashlights, and wore clothing that identified them as law enforcement. *Id*. at 174-77. Because there was no doorbell, agents banged on the door to notify residents of their presence and verbally identified themselves as "police" or "FBI" and Defendant's mother opened the door. *Id*. at 177-78, 208-10. As agents occupied the ground floor, search team members positioned themselves at the bottom of the stairs pointing flashlights up the stairs; it is unclear whether, and if so, how many, firearms were aimed toward the top of the staircase. *Id*. at 81-84, 131-33. When directed to come down the stairs, Defendant descended to the first floor and was further directed to a couch in the living room to remain in place while the warrant was executed. *Id*. at 67-68, 85-86, 133-34. An upstairs occupant other than Defendant did not come down when directed, and officers ascended the stairs to extricate the individual from his room. *Id*. at 50-52, 87-88.

[1] *See United States v. Stacey*, No. 16-CR-96, Dkt. No. 59 (N.D.N.Y. Aug. 10, 2017); *United States v. Safford*, No. 17-CR-54, Dkt. No. 57 (N.D.N.Y. Sept. 18, 2017).

According to the officers, no weapons were ever pointed directly at Defendant or any of the other occupants of the home. *Id*. at 20, 69, 75, 134-35.

After clearing the second floor of the residence, Special Agent Seymour approached Defendant and asked to speak with him somewhere private. *Id*. at 144-45, 189-90. Defendant agreed but asked to speak where his mother and brother would not be able to hear. *Id*. at 190. Pursuant to FBI policy in effect at the time, the interview of Defendant was not electronically recorded. *Id*. at 193-94. Before beginning this conversation, Seymour advised Defendant that he was not under arrest, that he was not required to answer their questions, and that he was free to leave at any time; he did not, at that time, advise Defendant of his *Miranda* rights. *Id*. at 100, 146, 148-49. Seymour testified that the FBI sought to learn from Defendant, and from any other individuals present in the house, information relating to a computer in the home being used to access the "Playpen" website through the Tor browser. They sought to learn in particular about the residents' access to computers, their computer host names, and use of the Tor browser in connection with child pornography. *Id.* at 170-72, 197-99. During this conversation, only Vidansky, Seymour, and Defendant were present. *Id*. at 98-99. After Defendant admitted to his use of a Tor browser and identified himself as the "Playpen" user under investigation, the agents asked Defendant to accompany them to the Columbia County Sheriff's Office for further questioning. *Id*. at 102-03, 199.

Seymour testified that the purpose of interviewing Defendant away from other occupants of the residence, like his mother, was so that they could speak freely and privately given the sensitive and embarrassing nature of discussing pornography. *Id.* at 190-91. He did not recall whether it was his or Defendant's idea to go outside, but recalled that he suggested they talk somewhere privately. *Id.*

The only factual point in meaningful conflict between the testimony adduced at the hearing and the declarations submitted in the pre-hearing papers is that Defendant, in his affidavit, states that, from the living room couch, he was "escorted to another group of law enforcement agents outside in the yard" and that he was "surrounded by several law enforcement agents." Dkt. No. 17-2 at ¶¶ 19-21. The evidence adduced at the hearing, however, credibly demonstrates that he was escorted by Seymour and Vidansky, and that no other law enforcement officers were present during this discussion. Defendant further affirmed that he "did not understand [his] rights not to answer question or to have a lawyer assist [him] to decide whether to answer questions or to have a lawyer assist [him] during questioning." *Id.* at ¶ 24.

This further questioning at the Sheriff's Office was audio and video recorded and lasted less than an hour. *See* Govt. Ex. 4.[2] Before starting the interview, Seymour can be explicitly heard delivering *Miranda* warnings to Defendant. *Id.* at 8:21:30-8:22:35. Specifically, he advised Defendant of his "right to remain silent," that Defendant could "refuse to answer any questions," and told Defendant that "anything you do say can and will be used against you in a court of law." *Id*. Seymour went on to say tell Defendant that "you have the right to stop answering my questions at any time you desire, so like I said, if you say 'I don't want to talk to you anymore, Brian, I'm out of here,' I'll drive you home, or you can walk out the front door." *Id.* He advised Defendant of the "right to an attorney, or a lawyer, to be present while you speak with me, before speaking with me, and you have the right to remain silent until you can speak with a lawyer." *Id*. Defendant was advised that if he wanted a lawyer and could not afford one, one would be provided. *Id*. Defendant was then asked, "You understand, you've heard these before, you understand what I'm saying?" *Id*. Defendant responded with a head nod. *Id*. He was asked

[2] The parties' exhibits were conventionally filed with the Court in DVD format.

"Do you have any questions about this stuff?" *Id*. Defendant replied, "No." *Id.* Seymour asked, "Do you have any concerns about talking with me?" *Id*. Defendant replied, "Quite a few, but . . ." and trailed off when Seymour continued, "Okay. We can address those. And now that we've discussed this are you still willing to talk with us?" *Id.* Defendant responded in the affirmative. *Id.*

III. DISCUSSION

A. Custodial Interrogation

Defendant argues that the questioning that took place on the searched property was custodial, and therefore his statements made before being given his *Miranda* warnings should be suppressed. He further argues that his later statements made in the Sheriff's office were not made after a knowing and voluntary waiver of his *Miranda* rights, and therefore should also be suppressed. The Government argues that the interviews were not custodial, and therefore did not require *Miranda* warnings, and further that, regardless, Defendant knowingly and voluntarily waived his *Miranda* rights before the interview at the Sheriff's Office.

Miranda v. Arizona, 384 U.S. 436 (1966), requires that officers must advise an individual who is in custody of certain rights, including the right to have an attorney present during questioning, before government agents interrogate him. "Because *Miranda* warnings are intended 'to dissipate the compulsion inherent in custodial interrogation and, in so doing, guard against abridgment of the suspect's Fifth Amendment rights,' *Moran v. Burbine*, 475 U.S. 412, 425, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986), it naturally follows that *Miranda*'s warning and waiver requirements apply only in the context of 'custodial interrogation,' *i.e.*, a person must have been both in custody and subjected to interrogation for statements made without warnings or waiver to be inadmissible in the government's case in chief." *United States v. Rommy*, 506 F.3d 108, 131-

32 (2d Cir. 2007) (quotation and other citations omitted). "*Miranda* defined 'interrogation' as 'questioning initiated by law enforcement officers.'" *Id.* at 132 (quotation omitted). "The Supreme Court later refined this definition to include 'not only . . . express questioning, but also . . . any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" *Id.* (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980)) (other citation omitted); *see also Rosa v. McCray*, 396 F.3d 210, 220-21 (2d Cir. 2005); *United States v. Carmona*, 873 F.2d 569, 573 (2d Cir. 1989). "Because the underlying purpose of the *Miranda* rule is to dispel compulsion, the relevant inquiry in deciding whether words or actions constitute interrogation focuses 'primarily upon the perceptions of the suspect, rather than the intent of the police.'" *Id.* (quotation and other citations omitted).

"As *Miranda* itself recognized, however, '[v]olunteered statements of any kind are not barred by the Fifth Amendment' and, thus, do not require preliminary advice of rights." *Rommy*, 506 F.3d at 132 (quoting *Miranda v. Arizona*, 384 U.S. at 478, 86 S. Ct. 1602); *accord Rhode Island v. Innis*, 446 U.S. at 300. "In *Edwards v. Arizona*, the Supreme Court explained that, even if a defendant has asserted his Fifth Amendment right to counsel, if the defendant 'himself initiates further communication' with law enforcement, 'nothing in the Fifth and Fourteenth Amendments would prohibit the police from merely listening to his voluntary, volunteered statements and using them against him at the trial.'" *Id.* (quoting *Edwards v. Arizona*, 451 U.S. 477, 485, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981)). *Edwards* cautioned, however, that

> [i]f, as frequently would occur in the course of a meeting initiated by the accused, the conversation is not wholly one-sided, it is likely that the officers will say or do something that clearly would be "interrogation." In that event, the question would be whether a valid waiver of [the defendant's Fifth Amendment rights] had occurred[.]

Edwards, 451 U.S. at 486 n.9.

"A criminal defendant bears the burden of establishing that he or she was subjected to custodial interrogation." *United States v. Ramos*, No. 1:11-cr-111, 2012 WL 1854747, *11 (D. Vt. May 21, 2012) (citations omitted); *see also United States v. Jorgensen*, 871 F.2d 725, 729 (8th Cir. 1989) (affirming district court's dismissal of the defendant's *Miranda* claim because the defendant "failed to demonstrate that he was subjected to custodial interrogation"); *United States v. Davis*, 792 F.2d 1299, 1309 (5th Cir. 1986) ("[Defendant] had the burden of proving that he was under arrest or in custody"); *United States v. Marchese*, 966 F. Supp. 2d 223, 239 (W.D.N.Y. 2013) (citation omitted). The test for "whether a suspect is 'in custody' is an objective inquiry," *J.D.B. v. North Carolina*, 564 U.S. 261, 270 (2011), made after examining "all of the circumstances surrounding the interrogation," *Id.* at 270-71 (quoting *Stansbury v. California*, 511 U.S. 318, 322, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994)).

> Those circumstances include, inter alia, the interrogation's duration; its location (*e.g.*, at the suspect's home, in public, in a police station, or at the border); whether the suspect volunteered for the interview; whether the officers used restraints; whether weapons were present and especially whether they were drawn; whether officers told the suspect he was free to leave or under suspicion. . . . The circumstances also include, and especially so in border situations, the nature of the questions asked.

United States v. FNU LNU, 653 F.3d 144, 153 (2d Cir. 2011).

A court should "begin any custody analysis by asking whether a reasonable person would have thought he was free to leave the police encounter at issue. If the answer is yes, the *Miranda* inquiry is at an end; the challenged interrogation did not require advice of rights." *United States v. Newton*, 369 F.3d 659, 672 (2d Cir. 2004). "On the other hand, if a reasonable person would not have thought himself free to leave," the "court must ask whether, in addition to not feeling free to leave, a reasonable person would have understood his freedom of action to have been

curtailed to a degree associated with formal arrest." *Id.* at 672.[3] "Only if the answer to this second question is yes was the person 'in custody[.]'" *Id.* (quoting *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984)).

The Second Circuit has held that "[t]he free-to-leave inquiry constitutes a necessary, but not determinative, first step in establishing *Miranda* custody." *Newton*, 369 F.3d at 670. "The ultimate inquiry for determining *Miranda* custody is . . . whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Newton*, 369 F.3d at 670 (quoting *California v. Beheler*, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983) (per curiam) (quotation omitted)).

In *United States v. Faux*, 828 F.3d 130 (2d Cir. 2016), the Second Circuit reversed the district court's finding that the defendant was in custody. In that case, approximately ten to fifteen agents executed the search warrant at the defendant's home at around sunrise. *See Faux*, 828 F.3d at 132. The defendant was questioned during a two-hour interview in the dining room, apart from her husband, and was not allowed to move freely about her home during the interview. *See id.* at 133. An agent escorted the defendant to the bathroom, where the agent stood outside, and to her bedroom so that she could get a sweater. *See id.* The agents never told her that her participation was voluntary or that she was free to leave. *See id.* at 134. Approximately twenty minutes into the interview, agents told the defendant that she was not under arrest. *See id.* The agents also seized the defendant's cell phone. *See id.* at 133. The Second Circuit concluded as follows:

---

[3] This is because the "free-to-leave inquiry reveals only whether the person questioned was seized," and "not every seizure constitutes custody for purposes of *Miranda*." *Newton*, 369 F.3d at 672.

> On this record, and given our precedents, it must be concluded that [the defendant] was not in custody. True, the two-hour interview was conducted while officers swarmed about her home. But she was told 20 minutes into the interview that she was not under arrest; she was never told that she was *not* free to leave; she did not seek to end the encounter, or to leave the house, or to join her husband; the tone of the questioning was largely conversational; there is no indication that the agents raised their voices, showed firearms, or made threats. Her movements were monitored but not restricted, certainly not to the degree of a person under formal arrest. She was thus never "completely at the mercy of" the agents in her home.

Id. at 138-39. The Second Circuit also noted that "courts rarely conclude, absent a formal arrest, that a suspect questioned in her own home is 'in custody.'" *Id.* at 135-36.

In the present matter, Defendant asserts that "[g]iven the totality of the circumstances . . . he was in custody comparable to an arrest during the time that Seymour and Vidansky questioned him at his home." Dkt. No. 29 at 6. As the Court noted above, it is the exception where, absent formal arrest, a defendant will be considered in custody while in his own home. The Court concludes that here, too, Defendant was not in custody.

Here, approximately fourteen officers were involved in executing the warrant of the residence. Dkt. No. 28 at 173-74. After complying with the officers' instruction that he come down stairs, he remained on the living room couch while the officers completed execution of the warrant. He was interviewed by only two officers immediately outside the home, and was told before beginning that conversation that he was not under arrest, that he was not required to answer their questions, and that he was free to leave at any time. *Id*. at 100, 146, 148-49. Defendant notes that he was bare foot at the time he was interviewed at the residence, but by his own admission, the interview lasted not longer than approximately twenty-five minutes. *See* Dkt. No. 29 at 6. As noted above, the Second Circuit in *Faux* held that where a defendant was told she was not under arrest twenty minutes into a conversation, was never told that she was *not* free to

leave, and never sought to end the conversation, the defendant was not in custody. *See Faux*, 828 F.3d at 132. Here, Defendant was told at the *outset* of the conversation that he was free to leave and that he was not under arrest. As the circumstances so far discussed demonstrate, it is even more clear in the present matter than in *Faux* that Defendant was not under arrest.

Considering all of the circumstances of this case, no reasonable person would have thought their freedom of action to have been curtailed to a degree associated with formal arrest. By the time Defendant was interviewed, all weapons had been holstered, there were no raised voices, he was not handcuffed, and the evidence has persuaded the Court that he was asked to speak further at the police station of his own volition without a hint of coercion. The evidence demonstrates that after the agents had completed securing the residence, further interaction with Defendant was preceded by clear communication that he was not under arrest or in custody. It cannot be maintained that Defendant was in custody when interviewed at his residence given these considerations.

The Government also maintains that the objective circumstances of the interview that took place at the Columbia County Sheriff's Office do not support a finding that Defendant was in custody. Indeed, at the outset, a person who voluntarily comes to a police station for questioning is not, without more, in custody. *See United States v. Mussaleen*, 35 F.3d 692, 697 (2d Cir. 1994). There is simply no indication on this record that there were circumstances that would cause a reasonable person to believe they were in custody during the interview at the Sheriff's Office. The Court has reviewed the recording of the interview, and the officers spoke in a conversational tone while advising Defendant of his *Miranda* rights as detailed above, and continued in a conversational tone throughout the interview. Defendant was not restrained, he

was asked whether he wanted the door open or closed, and was unequivocally told that he was free to leave and that he did not need to speak with the officers if he did not wish to do so.

Moreover, the demeanor of the officers during this interview, if anything, further supports the version of events at the residence described at the evidentiary hearing by the officers—that their interaction with Defendant was voluntary, and that they took care to ensure that Defendant was aware he was not under arrest or required to speak with them. Defendant and the officers can be observed engaging in a casual tone, and at one point one of the officers even says, after reiterating that Defendant was not under arrest and was free to leave or to stop talking at any point, "You've been honest with us so far, I don't know why you would do that, but if you want to . . ." Govt. Ex. 4 at 8:17:08. At the conclusion of the interview, Defendant demonstrated his capacity to understand the situation, asking what the implications were moving forward, given what he had told the officers so far. *See id*. at 9:07:40.

As the Government notes, once the interview ended, Defendant was, in fact, not arrested and was driven back to his residence. Considering the totality of the circumstances, the Court finds that a reasonable person would have felt free to leave, and would not have understood his freedom of action to be restricted in a manner akin to formal arrest. The Court concludes that Defendant was not in custody for the interview at the Sheriff's Office.

B. Sufficient *Miranda* Warnings and Waiver

Even if the Court found that Defendant was in custody while at the Sheriff's Office, the evidence before the Court clearly establishes that the *Miranda* warnings were sufficient and that Defendant knowingly and voluntarily waived his rights.

When a defendant moves to suppress a statement that he claims was obtained in violation of *Miranda*, the government has the burden of proving by a preponderance of the evidence that

the statement was made after a voluntary, knowing and intelligent waiver of the defendant's *Miranda* rights. *See Colorado v. Connelly*, 479 U.S. 157, 168 (1986); *United States v. Anderson*, 929 F.2d 96, 99 (2d Cir. 1991) (citation omitted). For a waiver to be voluntary, the waiver must have been "the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Moran v. Burbine*, 475 U.S. 412, 421 (1986). In addition, for a defendant to make a knowing and intelligent waiver, he must have "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.*; *see also United States v. Taylor*, 745 F.3d 15, 23 (2d Cir. 2014) ("'[K]nowing' means with full awareness of the nature of the right being abandoned and the consequences of abandoning it, and 'voluntary' means by deliberate choice free from intimidation, coercion, or deception"). However, the accused need not "know and understand every possible consequence of a waiver of the Fifth Amendment privilege." *Colorado v. Spring*, 479 U.S. 564, 574 (1987). Instead, the accused need only be aware that "he may choose not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time." *Id.* Generally, a suspect who reads, acknowledges, and signs a waiver form before making a statement has knowingly and voluntarily waived his *Miranda* rights. *See United States v. Plugh*, 648 F.3d 118, 127-28 (2d Cir. 2011).

In assessing the defendant's comprehension and voluntariness of the waiver, the court must look to the totality of the circumstances. *See id.* This includes the characteristics of the defendant, *i.e.*, background, experience, and conduct, the setting surrounding the statement, and the conduct of the officers. *See North Carolina v. Butler*, 441 U.S. 369, 374-75 (1979); *see also Taylor*, 745 F.3d at 23-24. Other relevant factors include the defendant's age, education, and intelligence, the lack of any advice to the accused regarding his rights, length of detention, nature

of the interrogation, and the use of physical punishment. *See United States v. Guarno*, 819 F.2d 28, 30 (2d Cir. 1987) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26 (1973)).

As discussed above, before starting the interview, Seymour explicitly delivered *Miranda* warnings to Defendant. *Id.* at 8:21:30-8:22:35. He advised Defendant of his "right to remain silent"; that Defendant could "refuse to answer any questions"; that "anything you do say can and will be used against you in a court of law"; that "you have the right to stop answering my questions at any time you desire, so like I said, if you say 'I don't want to talk to you anymore, Brian, I'm out of here,' I'll drive you home, or you can walk out the front door." *Id.* Seymour advised that Defendant had the "right to an attorney, or a lawyer, to be present while you speak with me, before speaking with me, and you have the right to remain silent until you can speak with a lawyer." *Id*. Defendant was advised that if he wanted a lawyer and could not afford one, one would be provided. *Id*. When asked if he understood these rights, Defendant responded in the affirmative and signed a card listing these *Miranda* rights. *See* Dkt. No. 17-6. The officers repeatedly reminded Defendant of his right to stop talking at any point, and eventually Defendant did conclude the interview and was driven home. Nothing about Defendant's background or experience gives the Court pause as to whether the waiver was knowingly and voluntarily executed; and, in fact, his conduct gives the Court confidence that he fully understood his rights and the consequences of waiving them. The unthreatening setting and behavior of the officers further support that the waiver was voluntary. And Defendant's manner of speech and overall composure suggest more-than-sufficient intelligence to understand the nature and consequences of waiving his rights. Given the totality of the circumstances, the Court concludes that, even if Defendant was in custody at the time of his interrogation at the Sheriff's Office, he knowingly and voluntarily waived his rights.

Based on the foregoing, Defendant's motion to suppress is denied.

IV. CONCLUSION

Upon careful review of the evidence adduced at the hearing, the parties' submissions, and the applicable law, the Court hereby

ORDERS that Defendant's motion to dismiss the indictment or to suppress evidence is **DENIED**; and the Court further

ORDERS that the Clerk of the Court shall serve a copy of this Memorandum-Decision and Order upon all parties in accordance with the Local Rules.

IT IS SO ORDERED.

Dated: June 17, 2019
Albany, New York

Mae A. D'Agostino
U.S. District Judge